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No. 05-1645 *vide* 06-11

IN THE

Supreme Court of the United States

CAROLINE WALLACE AND EMILY MAW,

Petitioners

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to this Court's Rule 15.8, Petitioners Caroline Wallace and Emily Maw submit this supplemental brief to respond to the Brief for the United States as *Amicus Curiae*. The government does not dispute that there is a conflict between the decision below and that of a state court of last resort, *Dingemans v. Board of Bar Examiners*, 568 A.2d 354 (Vt. 1989), on the important issue of the preemptive effect of the Immigration and Nationality Act on state licensing regimes that discriminate against aliens. Amicus Br. at 7, 13-14. Instead, the government offers an assessment of the merits of the conflict that rests on an illogical premise and on a misinterpretation of this Court's decision in *Toll v. Moreno*, 458 U.S. 1 (1982).

The government also cannot refute that a conflict exists between the decision below and *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981) concerning the proper level of equal protection scrutiny to apply to state laws that discriminate against subclasses of aliens. Instead, the government relies on cases addressing issues *not* presented here: the *federal* government's authority to discriminate among aliens and the "political functions" exception to strict scrutiny.

There are real conflicts in the law regarding important issues of federal preemption and equal protection scrutiny. The Court should grant the petition for a writ of certiorari to address and resolve these conflicts.

I. The Court Should Resolve the Preemption Conflict.

The government does not dispute that there is a conflict with *Dingemans* on whether the Immigration and Nationality Act preempts state laws that prohibit holders of H-1B visas from becoming state bar members solely on the basis of their status as aliens. Instead, the government argues that the conflict should be ignored because the Supreme Court of Vermont "did not have the benefit of DHS's views in resolving the preemption question," and DHS is said to "interpret[] the federal scheme to allow each State to decide the extent to which" H-1B visaholders "will be eligible for bar membership." Amicus Br. at 12, 14. The argument is meritless.

In the first place, DHS has no apparent jurisdiction to confer on States an authority to discriminate against aliens or subclasses of aliens, and thus any pronouncements by it on this subject are not entitled to deference. The timing of DHS's interpretation also strips it of any deferential respect. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (agency arguments advanced for the first time in litigation engender "near indifference"). *Cf. Medtronic v. Lohr*, 518 U.S. 470, 512 (2000) ("It is not certain that an agency regulation determining the preemptive effect of *any* federal statute is entitled to deference.") (O'Connor, J., concurring in part, dissenting in part).

Second, the asserted position of DHS is extreme and illogical. The government claims that since a state license is a precondition for an H-1B visa, Congress left to the States the right to preclude aliens from becoming eligible for licenses solely on the basis of their alien status. *See id.* at 8. Apparently, DHS would see no preemption problem if all 50 states decided not to allow any aliens to have licenses for any specialty occupations, notwithstanding that the Immigration and Nationality Act expressly provides for the admittance of aliens in such fields. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(B).

But why would a federal statute provide for visas that would never issue if States could prohibit persons from applying based solely on their status as aliens? It is absurd to interpret the federal statute that permits aliens to work as lawyers (or other licensed professions) as allowing the States to veto that decision by denying aliens the ability to seek a license in the first instance, solely on account of their alien status. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

Congress cannot delegate to the States its plenary authority over immigration matters, U.S. Const. art. I, § 8, yet DHS's interpretation of the Act would make the States the decisionmakers on whether any H-1B visas can issue. The Supreme Court of Vermont's correct interpretation in *Dingemans* recognizes the federal preemption in this field. While States are free to set qualifications for licensure,[1] *Dingemans* simply holds that in doing so States cannot impose special burdens that would apply only to aliens because such barriers were not anticipated or contemplated by Congress in authorizing the admittance of aliens to practice in these fields. *See* 568 A.2d at 356.

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[1] The government argues that "Congress has not required States to make aliens eligible for a license so that they would then be eligible for H-1B status" and that Congress would not "seek to displace traditional state licensing authority." Amicus Br. at 9, 10. These statements misapprehend Petitioners' claim. Louisiana is not required to license Wallace or Maw to practice law because they are temporary visaholders; rather, Louisiana may not prevent them from becoming bar members solely because they happen to reside in the United States under a nonpermanent visa. Of course, in order to become bar members, Petitioners must meet the academic, character and fitness requirements set by the State. Thus, Maw has filed her equivalency paperwork and Wallace has taken and passed the Louisiana Bar exam.

A preemption holding would be consistent with the principles enunciated in *Toll*, which involved a state law that stood as an obstacle to the accomplishment of the full purposes and objectives of Congress as expressed in the Immigration Act's authorization of G-4 visas to World Bank employees. The Court held that the Act preempted Maryland's refusal to provide in-state tuition to the children of G-4 visaholders because this practice "frustrate[d] the federal policy" of admitting these aliens. 458 U.S. at 16. The Court held: "we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminatory tuition charges and fees solely on account of the federal immigration classification." *Id.* at 17. So too here: in authorizing H-1B visas, Congress could not have contemplated that States could render the availability of such visas illusory by refusing to let aliens apply for necessary licenses solely because they are aliens.

The government argues that the state law in *Toll* "directly conflicted with congressional judgments relating to the G-4 classification." Amicus Br. at 11. Petitioners agree. But the conflict in *Toll*—depriving the children of lawfully-admitted aliens the benefit of in-state tuition on account of their status as aliens—is no less "direct" than the conflict here. Federal law permits aliens to enter the country on nonpermanent visas to practice as lawyers; Louisiana would prohibit those visas from ever issuing "solely on the basis of the federal immigration classification." If anything, the conflict here is more "direct" than in *Toll*: Congress said nothing about in-state tuition, but it has spoken expressly regarding the practice of law by H-1B visaholders.

The state law here "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *De Canas v. Bicas*, 424 U.S. 351, 363 (1976) and imposes a "discriminatory burden[] upon the entrance or residence of aliens lawfully within the United States," *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 419 (1948). It is therefore preempted by federal law.

II. The Court Should Resolve the Equal Protection Conflict.

The government does not refute Petitioners' showing that a conflict exists between the Fourth Circuit's decision in *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981) and the decision of the Fifth Circuit in this case. Instead, the government argues that "it is unclear" whether the Fourth Circuit would consider itself "entirely bound" by its prior decision and then attempts to distinguish *Moreno* on the basis of the particular immigration classification at issue. *See* Amicus Br. at 19. Neither point has merit.

The Fourth Circuit cannot overrule a prior decision absent an en banc ruling or intervening Supreme Court precedent. *See McMellon v. United States*, 387 F.3d 329, 331-32 (4th Cir, 2004). *Moreno*'s adoption of the district court's application of strict scrutiny remains the law of the Fourth Circuit with respect to state law subclassifications based on alienage. *See* 645 F.2d at 220.

The government's attempt to distinguish *Moreno* because it involved G-4 visaholders as opposed to H-1B visaholders lacks merit. *See* Amicus Br. at 19. A classification is based on alienage regardless of how many or how few aliens fall within its scope. *See Nyquist v. Mauclet*, 432 U.S. 1, 19 (1977) ("The important points are that [the State law] is directed at aliens and only aliens are harmed by it."). An H-1B visaholder is not situated differently from a G-4 visaholder in terms of the "myriad other ways" each contributes to our society. *In re Griffiths*, 413 U.S. 717, 722 (1973). An H-1B visaholder can have "dual intent" and may seek permanent residence in the United States. *See* 22 C.F.R. § 41.11; 8 C.F.R. § 214.2(h)(16). And H-1B visaholders, unlike G-4 holders, pay federal and state income taxes. *See* 26 U.S.C. § 7701(b). There is no reason why the equal protection analysis should be less strict for the H-1B visaholders.

The government also argues that *Foley v. Connelie*, 435 U.S. 291 (1978) and *Mathews v. Diaz*, 426 U.S. 67 (1976) establish that strict scrutiny does not apply to all classifications based on alienage. *See* Amicus Br. at 15-16. But neither *Foley* nor *Mathews* is applicable here. This case does not involve a state law restricting employment in a political function, such as a police officer or government official; there is no reason to invoke the *Foley* exception to strict scrutiny.

This case also does not involve a challenge to a *federal* statute that discriminates on the basis of alienage, so reliance on *Mathews* is misplaced. The situation here involves a *State* depriving lawfully-admitted aliens of the equal protection of its laws, and the government can point to no authority other than the incorrect decision below that requires rational basis review in such circumstances.[2] The argument that the State's action has been "incorporated" into federal law (Amicus Br. at 18) and therefore is not subject to strict scrutiny is unsupported by any citations and is at odds with the undeniable fact that the discriminatory action in this case is solely that of the State of Louisiana, in which the federal government played no role at all.

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[2] The government argues that strict scrutiny is not appropriate because aliens residing abroad have "no ties to this country and no claim to equal treatment." Amicus Br. at 17. That statement is beside the point. Petitioners reside lawfully within the United States. The Fourteenth Amendment prohibits Louisiana from denying them "the equal protection of the laws." U.S. Const. amend XIV.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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